UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LEO DAVID HANSON, Plaintiff, v. PAULI, et. al., Defendants.	3:13-cv-00397-MMD-WGC **REPORT & RECOMMENDATION OF U.S. MAGISTRATE JUDGE** Re: Doc. # 53-Defendant Starling's Motion for Summary Judgment

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4. Before the court is defendant Jack Starling's (Starling) Motion for Summary Judgment (Doc. # 53).[1] Plaintiff Leo David Hanson (Plaintiff) filed an opposition (Doc. # 68) and Cross-Motion for Summary Judgment (Doc. # 69).[2] Starling filed a reply and errata to his reply (Docs. # 70, 73).[3]

After a thorough review, the court recommends that both Starling's motion and Plaintiff's cross-motion be denied.

I. BACKGROUND

Plaintiff, a pro se litigant, is a prisoner in the custody of the Nevada Department of Corrections (NDOC), and brings this action pursuant to 42 U.S.C. § 1983. (Pl.'s Compl., Doc. # 4.) The events giving rise to this action took place while Plaintiff was housed at High Desert State Prison (HDSP). (*Id.*)

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[1] Refers to court's docket number.

[2] These two documents are identical.

[3] The errata seeks to clarify that the document is both a reply in support of Starling's motion and an opposition to Plaintiff's cross-motion. The court will treat it as such.

On screening, the court determined Plaintiff could proceed with his claim of excessive force under the Eighth Amendment against defendants Starling and Kevin Pauli (Pauli). (Screening Order, Doc. # 3.) Plaintiff alleges that on May 29, 2013, he was complying with orders to lie down on the ground on his stomach, when without justification, Starling "bounced [his] head on the ground" and "began punching [him] in the head and around [his] neck area." (Doc. # 4 at 4-5.) He contends that Pauli then shot him with a 12-gauge shotgun, striking him in the bottom of his left foot and the back of his right leg. (*Id.*)

Pauli previously filed a motion for summary judgment (Doc. # 20), arguing that his use of force was justified and reasonable, asserting that Plaintiff had attacked defendant Starling and ignored repeated commands to stop fighting as well as a warning shot before Pauli, who was manning the "gun rail" above where Starling and Plaintiff were located, fired a live round with pellets in Plaintiff's direction to gain his compliance. (*Id.*) Plaintiff opposed that motion, and filed a cross-motion for summary judgment. (Doc. # 31.) The undersigned issued a report and recommendation on these motions on June 23, 2014, recommending that Pauli's motion be granted and that Plaintiff's cross-motion be denied. (Doc. # 49.) The undersigned concluded that Pauli produced evidence that his use of force was employed in a good-faith effort to restore discipline and gain Plaintiff's compliance with commands to cease engaging in an altercation with Starling, and not maliciously and sadistically to cause harm. (*Id.* at 13.) The undersigned likewise found that Plaintiff's opposition did set forth facts sufficient to create a genuine dispute of material fact with respect to his claim against Pauli, and instead focused on Starling's conduct. (*Id.* at 13-14.)

On September 16, 2014, District Judge Miranda M. Du issued an order rejecting the undersigned's report and recommendation, denied defendant Pauli's motion for summary judgment, and denied Plaintiff's cross-motion as moot. (Doc. # 59.) Judge Du agreed that, accepting Pauli's version of events, his use of force was not excessive under the Eighth Amendment. (*Id.* at 5.) Judge Du found, however, that Plaintiff asserted that he was lying on the ground when Starling began punching him and was trying to defend himself when Pauli shot him, in contradiction to Pauli's claim that he fired the warning and then live round only after

Plaintiff failed to follow repeated orders to stop fighting and lie on the ground. (*Id*. at 6.) Judge Du acknowledged that the facts presented a "close call" as to whether Pauli's use of force was excessive, but determined that the resolution of the facts was the province of the fact finder. (*Id*.)

On September 3, 2014, Starling filed his Motion for Summary Judgment. (Doc. # 53.) Starling argues that on May 29, 2012, Plaintiff launched an unprovoked physical attack on him which created a serious threat to Starling's safety, rejected Starling's attempts to de-escalate the situation, and punched Starling in the face. (Doc. # 53 at 3.) Plaintiff ignored repeated verbal commands from Pauli, and only stopped fighting after he was hit by the live round fired by Pauli. (*Id*.)

Plaintiff, on the other hand, argues that he was lying down on the ground, complying with the orders of Starling and Pauli when Starling continued to punch him and "bounce his head on the ground." (Docs. # 68/69.)

II. SUMMARY JUDGMENT STANDARD

"The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court." *Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994) (citation omitted). In considering a motion for summary judgment, all reasonable inferences are drawn in favor of the non-moving party. *In re Slatkin*, 525 F.3d 805, 810 (9th Cir. 2008) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). On the other hand, where reasonable minds could differ on the material facts at issue, summary judgment is not appropriate. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1)(A), (B).

If a party relies on an affidavit or declaration to support or oppose a motion, it "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4).

In evaluating whether or not summary judgment is appropriate, three steps are necessary: (1) determining whether a fact is material; (2) determining whether there is a genuine dispute as to a material fact; and (3) considering the evidence in light of the appropriate standard of proof. *See Anderson*, 477 U.S. at 248-250. As to materiality, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment; factual disputes which are irrelevant or unnecessary will not be considered. *Id*. at 248.

In deciding a motion for summary judgment, the court applies a burden-shifting analysis. "When the party moving for summary judgment would bear the burden of proof at trial, 'it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial.'...In such a case, the moving party has the initial burden of establishing the absence of a genuine [dispute] of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal citations omitted). In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the nonmoving party's case; or (2) by demonstrating the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *See Celotex Corp. v. Cartrett*, 477 U.S. 317, 323-25 (1986).

If the moving party satisfies its initial burden, the burden shifts to the opposing party to establish that a genuine dispute exists as to a material fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a genuine dispute of material fact, the opposing party need not establish a genuine dispute of material fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv.*,

Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (quotation marks and citation omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted). The nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data. *Id*. Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine dispute of material fact for trial. *Celotex*, 477 U.S. at 324.

That being said,

> [i]f a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may: (1) give an opportunity to properly support or address the fact; (2) consider the fact undisputed for purposes of the motion; (3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or (4) issue any other appropriate order.

Fed. R. Civ. P. 56(e).

At summary judgment, the court's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine dispute of material fact for trial. *See Anderson*, 477 U.S. at 249. While the evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn in its favor," if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. *Id*. at 249-50 (citations omitted).

III. DISCUSSION

A. Eighth Amendment Excessive Force

The Eighth Amendment prohibits the imposition of cruel and unusual punishment. U.S. Const. amend. VIII. It "embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citation and internal quotations omitted). The "unnecessary and wanton infliction of pain...constitutes cruel and unusual punishment forbidden by the Eighth Amendment." *Id*. (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986)).

"[W]henever prison officials stand accused of using excessive physical force in violation of the [Eighth Amendment], the core judicial inquiry is...whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992); *see also Whitley*, 475 U.S. at 320-21; *Watts v. McKinney*, 394 F.3d 710, 711 (9th Cir. 2005); *Martinez v. Stanford*, 323 F.3d 1178, 1184 (9th Cir. 2003). "When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated." *Hudson*, 503 U.S. at 9 (citing *Whitley*, 475 U.S. at 327).

In determining whether the use of force is excessive, courts are instructed to examine "the extent of the injury suffered by an inmate[;]" "the need for application of force, the relationship between that need and the amount of force used, the threat 'reasonably perceived by the responsible officials,' and 'any efforts made to temper the severity of the forceful response.'" *Hudson*, 503 U.S. at 7 (quoting *Whitley*, 475 U.S. at 321).

An inmate need not establish serious injury; however, the lack of serious injury is relevant to the Eighth Amendment inquiry. *See Wilkins v. Gaddy*, 130 S.Ct. 1175, 1178 (2010). "The extent of injury may also provide some indication of the amount of force applied." *Id.*

B. Analysis

Starling's version of events is virtually identical to the version asserted by Pauli in support of his motion for summary judgment: On May 29, 2012, at approximately 1:45 p.m., Starling was escorting 13 newly-admitted inmates to the custody of NDOC from the 5/6 quad yard into the 7/8 quad yard. (*Id.*) Starling had no weapons on him at that time, and there were many other unrestrained inmates in the 7/8 quad. (*Id.*) The other inmates in the 7/8 quad began calling out to the new inmates Starling was escorting, and Starling asked them to keep it down until he finished giving out their housing assignments. (*Id.*) He contends that Plaintiff initiated a verbal confrontation with Starling, yelling out that he felt Starling was disrespecting him. (*Id.*) Starling responded that he was not talking to Plaintiff, but Plaintiff continued to speak aggressively toward Starling. (*Id.* at 4.) Another inmate began to try and calm Plaintiff down, but Plaintiff jumped down from the short cement wall on which he was standing and began

clenching and unclenching his fists. (*Id.*) Plaintiff began walking toward Starling with clenched fists and crossed the red line in front of Starling, forcing Starling to turn his back to the inmates with whom Plaintiff had been standing. (*Id.*)

Starling asserts that he issued several verbal commands for Plaintiff to back up, which Plaintiff ignored. (*Id.*) Plaintiff then hit Starling in the face. (*Id.*) Pauli was assigned to the 7/8 quad "gun rail" and had a view of the incident, and when he saw Plaintiff hit Starling in the face he issued several verbal commands to Plaintiff to stop fighting. (*Id.*) Plaintiff ignored these commands and Plaintiff and Starling then fell to the ground. (*Id.*) Pauli issued additional verbal commands, which Plaintiff did not heed. (*Id.*) Pauli fired a blank round warning shot, but Plaintiff still refused to stop fighting. (*Id.*) Pauli issued several more verbal commands, which Plaintiff ignored and Pauli fired a live round of 7 1/2 birdshot three yards in front of Plaintiff in an attempt to skip the live round into him. (*Id.*) Several rounds struck Plaintiff and he stopped fighting. (*Id.*) Plaintiff was then restrained. (*Id.*)

Starling disputes that he "bounced Plaintiff's head on the ground." (*Id.*) Instead, he feared for his safety with all of the unrestrained inmates around him and headed toward the exit. (*Id.* at 5.) He radioed for backup and medical assistance. (*Id.*) He asserts that Officer Menendez arrived and Plaintiff began to have a medical episode involving convulsions where he banged his head on the ground "about five times before SC/O Menendez positioned his left hand under Plaintiff's head to protect it." (*Id.*) Plaintiff was transferred to the infirmary. (*Id.*) The infirmary records indicate that Plaintiff had a bump on his right forehead, multiple birdshot wounds, and complained of experiencing a seizure. (*Id.*) Plaintiff was admitted to the infirmary and was released ten days later. (*Id.*) He was charged and found guilty of assault and battery and received 540 days in disciplinary segregation, a loss of 867 days stat time and is required to pay restitution. (*Id.*)

Starling contends that he used hands-on force against Plaintiff only after he refused to comply with verbal commands and Plaintiff initiated the incident by punching him in the face. (*Id.* at 8.) He only used force to gain compliance of Plaintiff. (*Id.*) He further asserts that Plaintiff's injuries were relatively minor, and only the lump on his head is arguably attributable

to Starling, with the other injuries being inflicted as a result of Pauli's firing the live round. (*Id.* at 10.) He argues that the need to use force was great, given that Starling was in a quad with over 100 unrestrained inmates. (*Id.*) He maintains that he only used force after he tried to de-escalate the situation to no avail, and gave Plaintiff various verbal commands which Plaintiff failed to heed. (*Id.*) Again, he disputes that he "bounced Plaintiff's head on the ground." (*Id.*) He asserts that the lump on Plaintiff's head was either a result of Starling's attempts to defend himself or Plaintiff's medical episode following the incident. (*Id.* at 10-11.)

According to Plaintiff, he was on the yard on May 29, 2012, when Starling came with the newly-admitted inmates when Starling began yelling at the other inmates on the yard to be quiet and move back. (Docs. # 68/69 at 2-3.) Plaintiff concedes he asked Starling to "respect" the "veteran" inmates, to which Starling responded: "Who said that?" (*Id.* at 3.) Plaintiff identified himself, and Plaintiff reiterated that he thought Starling was being disrespectful to the inmates. (*Id.*) Starling told Plaintiff that Plaintiff could speak with him "one-on-one." (*Id.*) Plaintiff contends that Starling then began walking toward Plaintiff, and an altercation ensued between Plaintiff and Starling. (*Id.*) He contends that he when Pauli fired the first warning shot, he began to lie face down on the ground, and Starling continued to punch him, and then "bounced [his] head off the ground" and "punch[ed] him on the right side of his head, neck and ear, perf[o]rating the right ear." (*Id.*) He maintains that at that time he was not fighting Starling, nor could he have been, as he was lying on the ground, face down, trying to keep Starling from hitting him. (*Id.*, 9, 12-13) Plaintiff claims that the knot on his head was a result of Starling "bouncing his head off the ground." (*Id.*)

In his reply, Starling argues that Plaintiff does not raise a genuine issue of material fact so as to defeat Starling's motion for summary judgment by supporting his version of events with only his own affidavit. (Doc. # 70 at 2.) Starling concedes that Plaintiff was eventually lying on the ground, but claims that Plaintiff was fighting while he was on the ground, not lying down complying with orders. (*Id.* at 3.)

Plaintiff does not address whether or not he in fact instigated the incident; nevertheless, the court finds that a genuine dispute of material fact exists as to whether Starling used excessive

force. Starling maintains that he only used force necessary to gain Plaintiff's compliance and never "bounced Plaintiff's head on the ground." Plaintiff, on the other hand, asserts that once Pauli fired the warning shot, he was lying face down on the ground and complying with Starling and Pauli's commands, but Starling continued to punch him and "bounced his head on the ground" resulting in injury.

While Starling takes the position that Plaintiff's injury was superficial, Plaintiff contends the altercation resulted in a knot on his head. While the Eighth Amendment "necessarily excludes from constitutional recognition *de minimis* uses of physical force," Hudson, 503 U.S. at 9-10 (citation omitted) "[i]njury and force, however, are only imperfectly correlated, and it is the latter that ultimately counts." *Wilkins,* 130 S.Ct. at 1178-79. "An inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury." *Id.* The seriousness of Plaintiff's injury is in dispute.

Genuine disputes of material facts exist as to whether Starling utilized force in an effort to gain Plaintiff's compliance, or in a malicious and sadistic manner in order to cause harm, and as to the seriousness of Plaintiff's injuries. It is the province of the fact finder to determine whose version of events to believe. Therefore, both Plaintiff's and Starling's motions for summary judgment should be denied. With respect to the knot Plaintiff suffered on his head, if it is established that the nature of the injuries is more than *de minimis,* but still "relatively modest," the inmate's damages will likely be limited. *Id.* at 1180.

The court's determination does not change simply because Plaintiff's position is supported only by his own, "self-serving" affidavit. "[D]eclarations are often self-serving, and this is properly so because the party submitting it would use the declaration to support his or her position." *Nigro v. Sears, Roebuck and Co.*, --- F.3d---, 2015 WL 1591368, at * 2 (9th Cir. Apr. 10, 2015) (citing *S.E.C. v. Phan,* 500 F.3d 895, 909 (9th Cir. 2007) (holding that district court erred in disregarding declarations as "uncorroborated and self-serving")."The source of the evidence may have some bearing on its credibility, and thus on the weight it may be given by a trier of fact. But that evidence is to a degree self-serving is not a basis for the district court to

disregard the evidence at the summary judgment stage." *Id*. (citing 10A Charles Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2727 (3d ed. 2011)).

Finally, the court notes that Plaintiff has requested x-rays to demonstrate the location of the pellets that hit his body in able to prove he was on the ground. As Starling points out, it is not contested that Plaintiff was on the ground; therefore, to the extent Plaintiff moves for an order that x-rays be provided, that request should be denied.

C. Qualified Immunity

Starling argues he is entitled to qualified immunity. (Doc. # 53 at 11-12.) He contends he should receive qualified immunity because he only used the minimum amount of force necessary to gain control of Plaintiff who was attacking him in an open yard with 100 unrestrained inmates, and only used force after verbal attempts to de-escalate and secure compliance had failed. (*Id*. at 12.)

"Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2080 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)); *see also Chappell v. Mandeville*, 706 F.3d 1052, 1056 (9th Cir. 2013) (citation omitted) ("Qualified immunity protects government officials from civil damages 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.*");Padilla v. Yoo*, 678 F.3d 748, 758 (9th Cir. 2012); *Pearson v. Callahan*, 555 U.S. 223 (2009). "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 555 U.S. at 231.

"Whether qualified immunity applies thus 'turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.'" *Chappell*, 706 F.3d at 1056 (quoting *Messerschmidt v. Millender*, 132 S.Ct. 1235, 1245 (2012)). In other words, a "[g]overnment official's conduct violates clearly established law

when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *al-Kidd*, 131 S.Ct. at 2083 (alterations in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)); *see also Padilla*, 678 F.3d at 758 (citation omitted).

"[A] case directly on point [is not required], but existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 131 S.Ct. at 2083. "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions," and courts are "not to define clearly established law at a high level of generality[.]" *Id*. at 2084-85; *see also Dunn v. Castro*, 621 F.3d 1196, 1201 (9th Cir. 2010) ("[T]he right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established."). The court considers "whether 'a reasonable officer would have had fair notice that [the action] was unlawful, and that any mistake to the contrary would have been unreasonable.'" *Chappell*, 706 F.3d at 1056-57 (internal citation omitted).

At the time of this incident, the law was clearly established that the use of force in a malicious and sadistic manner to cause harm is excessive and violates the Eighth Amendment. *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992). While Starling maintains that he only used that force which was necessary to gain Plaintiff's compliance, and only after trying to de-escalate the situation, the court must construe the facts in the light most favorable to Plaintiff in evaluating whether Starling is entitled to qualified immunity. *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1180 (9th Cir. 2013). Construing the facts as such, the court cannot conclude that a reasonable officer would have continued to punch Plaintiff and "bounce his head on the ground" while he was lying on the ground, face-down, complying with Pauli's and Starling's orders. With the dispute as to these material facts, the court cannot find Starling is entitled to qualified immunity.

D. Request for Counsel

Plaintiff's opposition and cross-motion contain a request for counsel, based on Plaintiff's claim that he is at a maximum security prison with limited access to the law library and no

knowledge of the law concerning what he describes as his complex claims. (Docs. # 68/69 at 4, 25-32.)

As the court has previously explained, a litigant in a civil rights action does not have a Sixth Amendment right to appointed counsel. *Storseth v. Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981). In very limited circumstances, federal courts are empowered to request an attorney to represent an indigent civil litigant. The circumstances in which a court will grant such a request, however, are exceedingly rare, and the court will make the request under only extraordinary circumstances. *United States v. 30.64 Acres of Land*, 795 F.2d 796, 799-800 (9th Cir. 1986); *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). The decision whether to appoint counsel is discretionary with the court. *Harrington v. Scribner*, — F.3d —, 2015 WL 2106387, at * 8 (9th Cir. May 7, 2015).

A finding of such exceptional or extraordinary circumstances requires that the court evaluate both the likelihood of success on the merits and the pro se litigant's ability to articulate his claims in light of the complexity of the legal issues involved. Neither factor is controlling; both must be viewed together in making the finding. *Harrington v. Scribner*, — F.3d —, 2015 WL 2106387, at * (9th Cir. May 7, 2015); *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991), *citing Wilborn*, *supra*, 789 F.2d at 1331.

Here, Plaintiff is asserting a straightforward excessive force claim against two defendants. Plaintiff has thus far been able to articulate his claims well, filing oppositions to motions as well as cross-motions for summary judgment. Moreover, Plaintiff has not demonstrated a likelihood of success on the merits. As the court pointed out, *supra*, a genuine dispute of fact exists as to the officers' liability. Therefore, Plaintiff's request for the appointment of counsel should be denied.

IV. RECOMMENDATION

IT IS HEREBY RECOMMENDED that the District Judge enter an order **DENYING** Starling's Motion for Summary Judgment (Doc. # 53) and Plaintiff's Cross-Motion for Summary Judgment (Doc. # 69).

IT IS FURTHER RECOMMENDED that the District Judge enter an order **DENYING** Plaintiff's request for the appointment of counsel.

FINALLY, IT IS RECOMMENDED that the District Judge enter an order **DENYING** Plaintiff's motion for x-rays.

The parties should be aware of the following:

1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to this Report and Recommendation within fourteen days of receipt. These objections should be titled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the district judge.

2. That this Report and Recommendation is not an appealable order and that any notice of appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed until entry of judgment by the district court.

DATED: May 21, 2015.

William G. Cobb

WILLIAM G. COBB
UNITED STATES MAGISTRATE JUDGE